Supreme Court, U.S.
FILED
NOV 2 0 2000
CLERK

(2)

No. 00-673

In the

Supreme Court of the United States

ELIZABETH AND JAMES SANDERS,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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12pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. First Amendment protections for the newsgathering process must limit in some way prosecutors abilities to impede that process. 3

A. The newsgathering process merits protection under the First Amendment. 4

B. While this court has held that the First Amendment does not shield journalists from grand jury subpoenas, this case does not present the same considerations because application of the same logic would lead to a system without safeguards against abuse of the process. 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Boddie v. ABC, 881 F.2d 267 (6th Cir. 1989) 5

Branzburg v. Hayes, 408 U.S. 665 (1972) 5-7

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 5

Daily Herald Co. v. Munro, 838 F.2d 380 (9th Cir. 1988) 5

Davis v. East Baton Rouge Parish Sch. Bd., 78 F.3d 920 (5th Cir. 1996) 5

Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) 5

NAACP v. Button, 371 U.S. 415, 433 (1963) 6

Publicker Indus. v. Cohen, 733 F.2d 1059 (3rd Cir. 1984) 5

Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) 5

U.S. v. Sanders, 211 F.3d 711 (2nd Cir. 2000) 3, 4, 7

Statutes

28 C.F.R. 50.10 (2000) (Attorney General's "Policy with regard to the issuance of subpoenas to members of the news media") 4-5

49 U.S.C. § 1155(b) 1

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INTEREST OF *AMICUS CURIAE*[1]

Petitioner seeks review of his conviction under 49 U.S.C. § 1155(b) after he received material from a crash scene, and raises important issues concerning how federal officials chose to prosecute him, particularly by indicating that they would prosecute both him and his wife if he would not reveal his

[1] Pursuant to Sup. Ct. R. 37.6, counsel declares that *amicus curiae* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

confidential source.

The Reporters Committee agrees that a journalist's investigation of a highly controversial tragedy that led to a criminal conviction over his contacts with a source demands careful review to ensure that he has not been deprived of his First Amendment rights. This Court should accept review and correct the Second Circuit's determination that prosecutors exercising their powers are effectively exempt from considering the First Amendment rights of those they prosecute.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

SUMMARY OF THE ARGUMENT

The newsgathering process is protected — to some extent — by the First Amendment. That protection must be broad enough to provide meaningful judicial review of prosecutorial discretion in deciding whom to prosecute when that decision is allegedly made with the intent of punishing those with controversial views or those journalists who do not reveal their news sources to prosecutors.

Amicus Reporters Committee does not allege that such *animus* exists, and was not involved in the controversy below. Rather, it argues that courts must be willing to look closely at such allegations when they are made in relation to constitutionally protected activities, and must ensure that safeguards will

protect the important interests in newsgathering.

ARGUMENT

I. First Amendment protections for the newsgathering process must limit in some way prosecutors abilities to impede that process.

It is almost axiomatic to state that those who most need the protection of the First Amendment are those who advance the most controversial positions. James Sanders has staked out a controversial position by alleging that the TWA Flight 800 tragedy was caused by a missile; he can hardly be faulted for believing that the actions taken against him are colored at least in part by the revulsion federal officials have expressed for his theories.

The prosecution of James Sanders raises important constitutional concerns, simply because of the manner in which the process unfolded. After his theory was disclosed in a newspaper, Sanders was told that he and his wife would not be prosecuted for violations of federal law if he revealed his source. *Brief of Petitioner* at 4-5. His telephone toll records were subsequently subpoenaed, and the identity of his source was discovered. *Id.* at 5. Based on testimony from that source, they were convicted. *Id.* at 8.

In reviewing the convictions, the Second Circuit held that constitutional protections recognized by that circuit protecting journalists from being compelled to reveal their sources were of no benefit to James Sanders; that privilege applied to court action, and did not reach prosecutors' actions in using their discretion to decide whom they would prosecute. *U.S. v. Sanders*, 211 F.3d 711, 719 (2nd Cir. 2000).

Thus, meaningful review of prosecutors' actions that affect newsgathering was not available, and a journalist's discussions with a news source could be deemed a conspiracy to commit a crime. This should not be so in the absence of a rigorous First Amendment analysis, and review of this case will allow journalists to argue, as the petitioner says, for "necessary limits on prosecutorial conduct that impairs the constitutionally-protected ability to gather and report news." *Brief of Petitioner* at 16.

Sanders alleged below that the prosecution's pursuit of this case was fueled by a desire to punish him for promoting a theory that the government felt had been discredited and that allegedly created additional anguish for victims' families. 211 F.3d at 719. With such an allegation before the court, careful review of prosecutorial motives is certainly justified. While protecting the families of disaster victims is a noble endeavor, it does not justify a content-specific restriction of speech, much less a criminal prosecution for advocating a position contrary to the government's version of events.

A. The newsgathering process merits protection under the First Amendment.

Newsgathering does merit some degree of protection under the First Amendment. The guarantee of press freedom is meaningless if journalists do not possess a concomitant right to gather the news. As the Justice Department has long acknowledged:

> Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's respon-

> sibility to cover as broadly as possible controversial public issues.

28 C.F.R. 50.10 (2000) (Attorney General's "Policy with regard to the issuance of subpoenas to members of the news media").

This Court's holding that "without some protection for seeking out the news, freedom of the press could be eviscerated," *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972), has subsequently been cited repeatedly by a wide variety of courts to establish the general proposition that newsgathering process merits some degree of constitutional protection.

The *Branzburg* standard was utilized by this Court in laying the groundwork to establish that the public has a presumptive right of access to criminal trials. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980). It has also influenced the standards of most of the federal circuits. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (recognizing the need for a "constitutionally sensitized balancing process" in determining whether to quash subpoenas); *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984)(recognizing a presumptive right of access to civil trials); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (newsgathering right does *not* affect liability for generally applicable tort claims); *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920 (5th Cir. 1996) (a court's gag order violated the media's First Amendment rights); *Boddie v. ABC*, 881 F.2d 267 (6th Cir. 1989) (finding a wiretapping law unconstitutionally vague); *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988) (law banning exit polling is unconstitutional).

But none of these cases seek to firmly establish the parameters of a right to gather the news. It remains for the courts to

determine the applicability of this right in each new setting, and review of the present case will allow the Court to determine how that right must influence the actions of prosecutors as they exercise almost unchecked discretion in deciding how and when to bring criminal actions. Allegations that prosecution was undertaken solely because a journalist refused to reveal the identity of a source demands careful examination because constitutional freedoms "are delicate and vulnerable, as well as supremely precious in our society" and "need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

B. While this court has held that the First Amendment does not shield journalists from grand jury subpoenas, this case does not present the same considerations because application of the same logic would lead to a system without safeguards against abuse of the process.

This Court, while acknowledging that there must be some degree of constitutional protection for newsgathering, has not ruled on the scope of that protection, and indeed has found it easier to say when this undefined right is *not* violated by government action. In fact, in establishing the proposition in *Branzburg*, the Court then went on to decide that the newsgathering right does not create a privilege protecting a journalists from being compelled to testify before a grand jury.

But the foundations beneath the Court's conclusion do not exist in the present case. The *Branzburg* Court noted that a privilege would not be necessary to vindicate First Amendment interests because of traditional safeguards against abuse of the grand jury process, noting specifically, "Grand juries are subject to judicial control and subpoenas to motions to quash." *Branz-*

burg at 708.

In the present case, the Second Circuit eliminated any type of judicial review from the equation and specifically declined to weigh the interest in prosecution against journalists' rights. *Sanders* at 719 ("We decline.") Quoting this Court, the court further stated:

> Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

Id. at 720. The strength and deterrence value of the case and the government's enforcement interests, however, are utterly irrelevant to the issue of whether a journalist's First Amendment rights have been violated. These interests, then, can only be vindicated by careful judicial review in situations where prosecution follows a constitutionally based decision to keep a source's identity confidential. As the petitioner in the present case has argued,

> The strategy adopted by the government in the present case demonstrates how prosecutors can circumnavigate the safeguards contemplated in *Branzburg*. . . . By utilizing a unilateral executive branch mechanism – the threat of prosecution – the government also placed its effort to obtain information about a journalists' confidential source beyond the reach of the "judicial control" [*Branzburg*, 408 U.S. at 708] to which it would have

been subject in the context of a grand jury proceeding.

Brief of Petitioner at 18. By explicitly declining to enforce the safeguards against undue burdens on constitutional rights, the Second Circuit has left journalists with no means of protecting their rights.

CONCLUSION

The prosecution of James and Elizabeth Sanders raises serious questions about how prosecutors respond to journalists' First Amendment interests.

The First Amendment protections for newsgathering require, at a minimum, some safeguards from unrestrained prosecution while exercising a constitutional right. Granting certiorari will allow this court to define a remedy that will balance the need for prosecutorial discretion with the First Amendment interests of journalists.

A just resolution of the present case does not require a full articulation of a newsgathering right or privilege, and does not require this court to find that the government violated that right. Rather, this court should accept review to consider the question of whether a new trial is warranted because the defendant was not allowed to discover evidence related to questions concerning a claim that directly implicated First Amendment interests — namely, that his prosecution was pursued in retaliation for his refusal to reveal his source.